No. 2877

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United States Circuit Court of Appeals

For the Ninth Circuit.

H. H. RIDDELL,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

PETITION FOR REHEARING

Upon Writ of Error to the District Court of the United States for the District of Oregon.

PETITION FOR REHEARING

The Plaintiff in Error now comes and petitions the Court for a Re-hearing of the above entitled cause, for the following reasons:

The Court in its discussion of the indictment seems to have missed the point urged, that the failure to allege an intent to defraud is the particular in which the indictment is defective. The Opinion does not point out where any such intent is averred. Nor does the Court say that such averment may be dispensed with. This could not be well said, in view of the many instances in which an allegation of such intent is held to be essential. In fact the excerpt quoted in the opinion from Samuels vs. United States, 232 Fed. 536, expressly states that the fraudulent intent is one of the material allegations of the indictment. The necessity for such allegation is conceded, where the Court uphold the trial Court in admitting the evidence concerning the Veason lands upon the ground that it was admissible to prove intent. If it is necessary to prove a fraudulent intent on the part of defendant it is necessary to aver it in the indictment. It is elemental law that every essential element of the offense must be set out. No case that we have seen indicates that an averment of an intent to defraud on the part of the defendant may be omitted. The cases cited in the opinion in support of the indictment's sufficiency, do not sustain the point that an

allegation of intent to defraud may be omitted. On the contrary they are in clear antagonism to the Court's ruling. Thus in Durland vs. United States, 161 U. S. 309, there appears in the indictment a distinct allegation of an express intent to defraud. It is this case that the Supreme Court stated that "the significant fact is the intent and purpose." The indictment in Oesting vs. U. S., 234 Fed. 305, contains the averment "with intent to defraud each and all of them." In Walker vs. U. S., 151 Fed. 111, the question of the sufficiency of the indictment does not seem to have been considered. The opinion discussed the sufficiency of the proof. In Spear vs. U. S., 228 Fed. 487, the indictment contained the averment "for the purpose of having said check or draft presented and collected for the use and benefit of themselves." This and other averments in the indictment were held to be sufficient to show the intent and purpose to convert the proceeds of the checks to their own use. In Moffatt vs. United States, 232 Federal 525, the indictment avers that "said proceeds would be converted to the use of said Moffatt." The Court say that "the crime here charged is made up of acts and intent, and these must be set forth in the indictment with reasonable particularity," and further state that it is sufficient if the intent to perpetrate the fraud be set forth in any part of the indictment instead of in the vidilicit as was contended, and further say: "His intent to defraud clearly appears from the language, 'that it was his intent to convert the proceeds of all sales

to his own use'," and further, "it is alleged that it was his intention to defraud the persons named in the indictment." The legal sufficiency of the indictment was not questioned by demurrer or otherwise in Colburn vs. U. S., 223 Fed. 590. The opinion states, "The scheme is explicitly charged to have been fraudulent in its design and entered upon by the defendants for the purpose of defrauding any person," etc.

Thus there is nowhere in the cases cited in the opinion any authority for the omission from the indictment of an allegation of an intent to defraud. They are authority for the necessity of such averment.

As maintained in the brief of Plaintiff in Error the indictment in the case here does not contain any allegation of an intent on the part of the defendant to defraud anyone. If it is not there, the indictment is defective in an essential particular. The brief of counsel for the prosecution does not point out where this material allegation can be found; nor does the opinion of the Court indicate where this essential averment appears. An exhaustive examination of the indictment itself does not disclose the allegation, but shows conclusively that it is not there, and that it would require a violent straining of the ordinary meaning of the language used to infer or imply such averment. But necessary averments cannot be supplied by inference or implication. Nothing is better settled than this. The whole

line of decisions of the Supreme Court have conclusively fixed the doctrine that no essential element of the offense can be omitted without destroying the whole indictment. The omission cannot be supplied by intendment or implication, and the charge must be made directly and not inferentially or by way of recital.

If it was necessary, or even permissible, to spend the greater portion of the time taken at the trial of this case to offer evidence the sole purpose of which was to prove an intent to defraud, it must have been to prove some important element of the offense charged in the indictment. One would naturally be led to believe that such an averment was necessary. But when the opinion of the Court is found in effect stating that no allegation of an intent to defraud is necessary or even desirable, and that defendant can be proceeded against without an allegation, that all the Courts have held to be essential to a valid prosecution, and that the great mass of the evidence and testimony taken at the trial running through many days' time was proper to prove intent, which the Court say is not necessary to the case, it leaves us at sea as to what the law is. If the defendant is not entitled to demand that an intent be averred, he should be allowed to object to a great mass of testimony that was offered for the sole purpose of prejudicing the jury, and to have a ruling that such evidence be excluded, when its sole claim to admissibility rests on a ground that is not required

to be pleaded and for a purpose that does not find a place in the indictment.

We are not impressed with the consistency of the opinion of the Court. Either it must be held essential to aver an intent to defraud, or if not then the prosecution should not be permitted to use the term as a subterfuge for producing vast quantities of evidence that was admissible on no other ground. The opinion gives an undue advantage to the Government. It may omit an essential element from the indictment, and yet produce all the evidence it desires to prove that which it is not required to plead. If the proof is necessary, the pleading is essential. No opinion can be written that will stand unless it adheres to these principles. They are well founded in our legal system, and a decision that does not recognize them, instead of stating the law, will be merely a decision in opposition to the law.

The action of the trial Court in admitting the testimony and exhibits touching the Veason lands and their character is upheld on the ground that the acts of the Company and its officers in regard thereto were admissible upon the question of the intent with which their acts in regard to the Hibberd lands were performed. This evidence was not offered by the Government for the purpose of proving intent, nor admitted by the Court for such purpose; nor was the evidence limited to the acts of the Company and its officers

in regard thereto, but covered a much greater scope. It was offered and admitted for the express purpose of proving the substantive offense charged. At the time the pamphlet "Success" was offered in evidence the Court remarked in the hearing of the jury:

"There are two things that the Government must prove in this case: First, that there was a scheme to defraud. That is the preliminary question. And second, that the mails of the United States were used in furtherance of such scheme. The indictment alleges a particular scheme and this is evidence bearing upon that question."

"Mr. Reames: That is the purpose for which it is offered." (Record p. 66.)

And further on objection made by Judge McCamant to the introduction of some of this evidence the Court said: "As I said this morning, this is attempting to prove the fraudulent scheme" (p. 69). And again the Court said (p. 71): "I don't think a man can assume the duties of the office of Secretary and allow the literature to go out with his name signed to it without some inference being drawn against him." And later counsel for the Government, in offering some of this evidence, said: "Government now offers in evidence but one of these forms. I don't care to put the whole fifty-one in, and I will say at the time of making the offer, that we will supple-

ment that later in the trial by proof that several of them, of this identical form, were actually received by people who purchased applications and received at their post office adresses through the medium of United States mail. *It is offered simply for the purpose of proving a fraud and proving scheme and artifice to defraud and to connect the defendant therewith.*" And again the Court said when the second edition of "Success" was offered (p. 73): "As I have ruled two or three times, that is not the question now. The question is now whether the Government is able to prove there was a scheme to defraud. That is one question, the first one; the second is whether Mr. Riddell was a party to it, if there was such a scheme, and third, if to further this scheme the mails were used. And this is on the first two as I understand, and for that reason is competent. Especially in view that Mr. Riddell was consulted about the changes made before."

And again (p. 76) upon an objection having been made to a paper relating to the Veason lands the Court admitted it, saying, "Very well part of the transaction," and again the Court said: "But the evidence in this case up to this time indicates that this concern was organized for a purpose the Government claims is fraudulent, etc." and so on throughout the course of the trial, the Court and District Attorney were constantly urging this evidence on the attention of

the jury for the purpose of proving the substantive offense, not the one element of intent on the part of the defendant, but as an integral part of the scheme, and as the scheme itself. The jury were firmly impressed with the belief that this evidence was for proving the substantive offense itself, and as a fact based their verdict on that evidence. The Court may indulge in reasoning to any extent it pleases. It cannot get away from the fact that the minds of the jury were poisoned and the verdict of guilty induced by the evidence relating to the Veason lands, and their understanding that the defendant was criminally responsible for the acts of Conway Richet, Byrne and Markillie, done in 1909 and 1910, and that the Hibberd lands cut but small figure in the case. During the whole course of the trial no intimation was made by counsel for the Government, that this evidence was offered to prove intent. The Court did not admonish the jury that this evidence was to be considered by them for the purpose of proving intent alone, and we submit that after the jury had listened to this evidence for the greater part of the trial and had it impressed on them for days as evidence of the offense for which the defendant was on trial, it had every effect for which the prosecution could have wished. The partial limitation in the charge of the Court was too meager by far to limit it to the one question of intent. Indeed, the limitation did not have the effect of confining its effect

to the one question of intent. The Court said that the evidence concerning the Veason lands "has been admitted and is to be considered by you in order that you may ascertain and determine the nature and character of the business in which these people were engaged and whether or not it was a fraudulent scheme. * * * * You have a right, as I suggested a moment ago, to consider the entire transaction, the circumstances under which the corporation was organized, the purpose for which it was organized, how it was organized, how it was conducted, and *from that* determine whether they were carrying on an unlawful scheme to defraud in exploiting the Union County land." The scope of this evidence was thus enlarged to an extent that enabled the jury to find from the evidence of the Veason lands alone that the company was carrying on an unlawful scheme to defraud in exploiting the Union County lands. No wider scope could have been asked. It was not a limitation to the permissible use of establishing an intent. To have been admissible it must have been strictly limited to this one purpose. Authority is wanting for relaxing the rule as to the evidence of collateral facts, to any but the recognized exceptions. Where the facts offered consist of past misconduct, and are offered to show motive, intent or the like and are not relevant for such purpose they are obnoxious to the character rule and must be excluded. They do injury because they unduly prejudice the ac-

cused and the Court should scrutinize with great care the right to offer such evidence, because of the great harm that may be done by erroneous or over loose interpretation. It is a settled rule that the evidence must be confined to the point in issue, and in criminal cases there is a greater necessity than in civil causes to enforce this rule. Austin vs. State, 14 Ark. 559, Wigmore Sec. 216, 300. It is a dangerous species of evidence, because it requires a defendant to meet and explain other acts than those charged against him, and for which he is on trial, but also because it may lead the jury to violate the great principle that a party is not to be convicted of one crime by proof that he is guilty of another. For this reason it is essential to the rights of the accused that when such evidence is admitted it should be carefully limited and guarded by instructions to the jury, so that its operation and effect may be confined to the single legitimate purpose for which it is competent. Com. vs. Shepard, 1 Allen (Mass.) 581; Commonwealth vs. Jackson, 132 Mass. 16.

Courts have ever been careful in requiring that when evidence of collateral facts is used, it must be clearly shown to come within one of the recognized exceptions to the general rule excluding such evidence, and that it must be clearly limited to the specific purpose for which it is admissible.

The language of the instruction that this Veason evidence is to be considered in order that the jury might determine whether or not it was a fraudulent scheme, does not savor of a limitation to the one element of the intent of defendant. No construction of which the language is capable can carry a meaning which limits the application to the one question of intent. The jury did not so consider it, nor treat it as so limited.

In its opinion the Court makes the statement that if the defendant desired any more specific instruction upon the subject that each letter or paper mailed constituted a separate offense he should have taken an exception to the charge of the court at the time.

This portion of the charge was excepted to as clearly as is ever done at the trial of a cause. The record shows clearly as the certificate of the trial court can state it that the particular instruction was duly excepted to (record pp. 186, 187). From the language of the opinion this portion of the record was undoubtedly overlooked by the Court. A definite and specific instruction was called to the attention of the trial Court, who was requested to so charge the jury and to its refusal an exception was duly taken before the jury had retired (p. 179, 180 record). The Court was asked to instruct the jury that the defendant could not be found guilty under the third count in the indictment unless the jury shall find that

the defendant mailed or caused to be mailed a certain letter of date June 26th, 1911, signed Oregon Inland Development Company, J. T. Conway, Vice-President and General Manager, addressed to W. C. Hayward, Manila, Iowa, which letter is set forth in the third count of the indictment. A similar instruction was requested in writing as to each of the remaining counts four and five. Each of these instructions requested is correct as law, and no valid objection can be made to them. In view of these requests it is startling to have it intimated that a more specific instruction should have been requested, and can only be attributable to an oversight, for it is in the record as clearly as the certificate of the trial judge can make it. In Boyd vs. United States, 142 U. S. 457, the Supreme Court reversed the case because of the admission of evidence of collateral facts, which the Court held were erroneously admitted, and even though the instruction limiting the scope of the evidence was not excepted to at all. In view of this action by the Supreme Court, it is strange to find these correct requests for the very specific instructions intimated passed by with the statement that they were not made the subject of a proper exception.

We cannot perceive how the Court is able to assume that the jury understood the instructions that the defendant might be found guilty if he deposited, or caused to be deposited, but one

letter, did not mean what it said. Juries are supposed to be guided by the instructions of the Court. As to the first two counts the Court simply said: "You are to disregard them in your deliberations" (p. 151). As to the remaining counts he used the express language: "nor is it necessary for the government to prove the mailing of all the letters set out in the indictment, and to which I have called your attention. It is sufficient if it has satisfied you that one or more of such letters was mailed by the defendant, or caused to be mailed by him" (p. 186) and further (p. 187): "You must * * * be satisfied * * * * that he placed, or caused to be placed, in the Post Office of the United States for mailing and delivery, one or more of the three letters or documents mentioned in the indictment, and to which I have called your special attention, for the purpose of executing such scheme." These instructions were duly excepted to, and the Court duly requested to charge that no conviction could be had on each of the three counts unless they should find that the defendant mailed or caused to be mailed the specific letter set out in such count. These requests were refused and the refusal was duly excepted to. This Court is not able to say that these instructions so given were not followed. It is not a usual thing for an appellate court to assume that an instruction of this nature would not be followed, or that it was intended to mean something other than what was

said. If the instructions of the Court are to be followed at all, how does the Court determine that they were obeyed in part and ignored in part? How can the Court say that the jury were properly guided by that part of the charge which was correct, and cast aside the instructions which were not in accordance with the law? This instruction, it will be observed, is a concrete direction to the jury that it is sufficient to convict if defendant was responsible for the mailing of one or more of the three letters or documents mentioned in the indictment. We submit that the determination of the Court does the defendant a manifest injustice, because it plainly declares the fact that his conviction was contrary to law.

The Court apparently passed over without consideration the exception to the instruction that the intention to defraud was conclusively presumed (record page 189). Much less conclusive instructions were held error in Coffin vs. United States, 156 U. S. 432; Hibbard vs. United States, 172 Fed. 66, 71; McKnight vs. United States, 115 Fed. 972; Chaffee vs. United States, 18 Wall 516; Cummins vs. United States, 232 Fed. 844; Konda vs. United States, 166 Fed. 93; Melton vs. United States, 120 Fed. 504; People vs. Baker, 96 N. Y. 340, 350, and the other cases cited in the brief of plaintiff in error. There can be no room to doubt the conclusive nature of the instruction excepted to, and as such it is obnoxious.

If the law were rightly administered no instruction to the effect that an intent might be inferred or presumed by the jury would be allowed. There are cases in which the intent may be inferred from the nature of the act, and others where willful intent or guilty knowledge must be proved, such as offenses involving a fraudulent intent. In such case a guilty intent is not to be inferred. Crimes of this nature constitute a distinct class in which the intent is not to be inferred from the commission of the act. People vs. Molineux, 168 N. Y. 297, 298. If intent is not to be inferred from the act itself, so as to warrant a departure from the general rule of criminal evidence and permit the admission of evidence of collateral acts to prove intent, then it was clearly error for the court to charge the jury that the intent to defraud the auction contract holders of the Oregon Inland Development Company upon the part of the defendant might be presumed. If an intent is to be presumed from the act itself, then no evidence can be required to prove it. In this case the rules were invoked to work with double severity against the defendant. Two-thirds of the evidence in the case was put in for the express purpose of proving the substantive offense, which is attempted to be justified on the ground of proving an intent to defraud on the part of defendant. It is in effect held that although so much evidence may be admitted to prove this intent, it is not necessary to plead it

in the indictment, and then after such a volume of evidence, admissible only to prove intent, and no pleading in the indictment of an intent to defraud, the Court goes further and instructs the jury that the intent may be presumed. Thus the important element of the intention of the defendant, is skilfully emasculated from the case, and a verdict of guilty obtained without the necessity of the jury making any finding as to this essential feature.

It is respectfully submitted to the consideration of the Court that a rehearing should be granted.

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